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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 ROBERT DUKOWITZ,

12 v.
13 Plaintiff,

14 JOHN KELLEMEN,

15
16 Defendant.

17 CASE NO. 3:18-cv-05968-BHS-JRC

18 ORDER TO SHOW CAUSE OR
19 AMEND COMPLAINT

20 Plaintiff Robert Dukowitz, proceeding *pro se*, filed this civil rights complaint under 42
21 U.S.C. § 1983. Plaintiff alleges his constitutional rights were violated when he was
22 misrepresented by defense counsel at trial, and naming only his defense counsel as a defendant in
23 this action. However, he has not demonstrated that defense counsel was acting under color of
24 state law at the time, and so has failed to show he can be held liable under § 1983. Having
reviewed and screened plaintiff's complaint under 28 U.S.C. § 1915A, the Court declines to
serve plaintiff's complaint because plaintiff has yet to plead sufficient facts to demonstrate that

1 defendant violated his constitutional rights. However, the Court provides plaintiff leave to file an
2 amended pleading by April 12, 2019, to cure the deficiencies identified herein.

3 In addition, it is unclear from the complaint whether petitioner will be able to effectively
4 cure the deficiencies identified by the Court. Therefore, the Court declines to grant plaintiff's
5 request to proceed *in forma pauperis* (Dkt. 5) at this time. The court will reconsider plaintiff's
6 request to proceed *in forma pauperis* once plaintiff has either provided an amended pleading or
7 otherwise responded to this order.

8 **BACKGROUND**

9 Plaintiff initially filed his complaint in December of 2018. Dkt. 1. He alleges defendant
10 John Kellemen, plaintiff's counsel at trial, violated his rights when he stated that plaintiff was a
11 murderer. Dkt. 1-1. He alleges defendant Kellemen prejudiced his trial and threatened him with
12 an additional ten years' incarceration because of defendant Kellemen's behavior at trial. *Id.* He
13 argues that his right to a fair trial was violated, and that defense counsel "slandered" plaintiff's
14 name and "defamed" his character. *Id.* For relief he seeks "[a]ccountability for the slandering and
15 defameing [sic] the character of [plaintiff's] name, violating [his] right to a fair trial, [he] seek[s]
16 the relief of 5 (five) million dollars . . ." *Id.*

17 **DISCUSSION**

18 Under the PLRA, the Court is required to screen complaints brought by prisoners seeking
19 relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. §
20 1915A(a). The Court must "dismiss the complaint, or any portion of the complaint, if the
21 complaint: (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted;
22 or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. §
23 1915A(b); 28 U.S.C. § 1915(e)(2); *see Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

1 Applying these principles, plaintiff's complaint suffers from deficiencies requiring
2 dismissal of some claims if not corrected in an amended complaint, as set forth below.

3 **I. Defense Counsel as Defendant**

4 To state a claim under § 1983, a plaintiff must allege: (1) the deprivation of right,
5 privileges, or immunities secured by the Constitution; (2) by a person acting under the color of
6 state law. *West v. Atkins*, 487 U.S. 42, 48-49 (1988). A person acts under color of state law when
7 he or she “exercises power possessed by virtue of state law and made possible only because the
8 wrongdoer is clothed with the authority of state law.” *Id.* at 49. “The purpose of § 1983 is to
9 deter state actors from using the badge of their authority depriving individuals of their federally
10 guaranteed rights.” *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000) (citing *Wyatt v. Cole*,
11 504 U.S. 158, 161 (1992)).

12 However, the Supreme Court has repeatedly recognized that public defenders are not
13 acting under color of state law for purposes of § 1983 when they act in their traditional role as an
14 advocate. *See, e.g., Vermont v. Brillon*, 556 U.S. 81, 91 (2009) (assigned public defender is
15 ordinarily not considered a state actor); *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk
C'nty v. Dodson*, 454 U.S. 312, 320-25 (1981) (a public defendant “does not act under color of
17 state law when performing a lawyer’s traditional functions as counsel” to a criminal defendant).
18 Public defenders and private criminal defense attorneys do not act under the color of law when
19 representing criminal defendants because they are not acting on behalf of the government; rather,
20 they are the government’s adversary. *See Pol C'nty*, 454 U.S. at 323 n.13; *see also Atkins*, 487
21 U.S. at 50.

22 Here, plaintiff has only named John Kellemen, plaintiff’s counsel at trial, as a defendant
23 in this action. Dkt. 1-1. As noted above, defense counsel are not state actors for purposes of §
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1 1983. Even when defense counsel renders ineffective assistance or a plaintiff alleges his counsel
2 has breached attorney-client confidentiality, defense counsel is still not a state actor for purposes
3 of § 1983. *See, e.g., Wood v. Patrick*, 2017 WL 1368981, at *1-*3 (D. Nev. March 15, 2017)
4 *report and recommendation adopted* 2017 WL 1371256 (noting that, although plaintiff alleged
5 his defense counsel provided ineffective assistance, affirmatively misled him, and breached
6 attorney-client privilege, defense counsel were still not state actors for § 1983 purposes).
7 Plaintiff has only alleged his defense counsel defamed his character and provided ineffective
8 assistance. However, he has not shown how defendant Kellemen was acting as a state actor when
9 he was representing plaintiff in his criminal trial, or that defense counsel was otherwise acting
10 outside his traditional role as an attorney. Thus, the Court finds plaintiff has not demonstrated
11 defendant Kellemen was acting under color of state law. Therefore, the Court declines to serve
12 his complaint at this time.

13 **II. Instructions to Plaintiff and the Clerk**

14 Due to the deficiencies described above, the Court will not serve plaintiff's amended
15 complaint. If plaintiff intends to pursue a § 1983 civil rights action in this Court, he must file an
16 amended complaint and write a short, plain statement telling the Court: (1) the constitutional
17 right plaintiff believes was violated; (2) the name or names of the person or persons who violated
18 the right; (3) exactly what each individual or entity did or failed to do; (4) how the action or
19 inaction of each individual or entity is connected to the violation of plaintiff's constitutional
20 rights; and (5) what specific injury plaintiff suffered because of the individuals' conduct. *See*
21 *Rizzo v. Goode*, 423 U.S. 362, 371–72, 377 (1976). In addition, plaintiff must demonstrate how

1 his defendant was acting under color of state law when he allegedly provided plaintiff ineffective
2 assistance.

3 Plaintiff shall present the amended complaint on the form provided by the Court. The
4 amended complaint must be legibly rewritten or retyped in its entirety, it should be an original
5 and not a copy, it should contain the same case number, and it may not incorporate any part of
6 the original complaint by reference. The amended complaint will act as a complete substitute for
7 the original complaint, and not as a supplement. An amended complaint supersedes all previous
8 complaints. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) *overruled in part on*
9 *other grounds*, *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). Therefore, the
10 amended complaint must be complete in itself and all facts and causes of action alleged in the
11 original complaint that are not alleged in the second amended complaint are waived. *Forsyth*,
12 114 F.3d at 1474. The Court will screen the amended complaint to determine whether it contains
13 factual allegations linking each defendant to the alleged violations of plaintiff's rights. The Court
14 will not authorize service of the amended complaint on any defendant who is not specifically
15 linked to a violation of plaintiff's rights.

16 If plaintiff fails to file an amended complaint or fails to adequately address the issues
17 raised herein **on or before April 12, 2019**, the undersigned will recommend dismissal of this
18 action pursuant to 28 U.S.C. § 1915.

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The Clerk is directed to send plaintiff the appropriate forms for filing a 42 U.S.C. § 1983 civil rights complaint and for service. The Clerk is further directed to send copies of this order and Pro Se Instruction Sheet to plaintiff.

Dated this 12th day of March, 2019.

J. K. Ward (signature)

J. Richard Creature
United States Magistrate Judge